

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
) August 17, 2017
) Minneapolis, Minnesota
) Courtroom 12W
) 9:15 a.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

THE HONORABLE WILLIAM H. LEARY, III
RAMSEY COUNTY DISTRICT COURT JUDGE

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19 Proceedings recorded by mechanical stenography;
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P R O C E E D I N G S

(9:15 a.m.)

THE COURT: Good morning. Please be seated, everyone.

MR. BLACKWELL: Good morning, Your Honor. I have some special guests I wanted to introduce.

THE COURT: Mr. Blackwell, I don't want to miss out on your special guests.

Okay. Who have you got with you today?

MR. BLACKWELL: I have some friends visiting from Australia. They just got in last night. Meg and Alain Carbonatto, and you have not yet had the pleasure of meeting my beloved, my wife Tiffany.

THE COURT: Which one? Who is who now?

MR. BLACKWELL: This is my wife Tiffany.

THE COURT: Hello.

MR. BLACKWELL: And this is Meg Carbonatto and Alain Carbonatto, who are Aussies visiting for a couple of days. The way I could spend the whole day with them is to bring them to work so.

THE COURT: It's bring your Australian relations to work today.

MR. BLACKWELL: Yes. Good morning, Your Honor.

THE COURT: Yeah, when my cousins come, we're going to have to nail down all the pencils. You probably

1 have a higher class of cousins than I do. What about
2 plaintiffs, do you have any?

3 MR. GORDON: I'm afraid we didn't realize, Your
4 Honor, this was the day to bring folks with us. We will
5 next time.

6 THE COURT: Oh, man. Well, anyway, it's nice to
7 see you. Let's finish with our appearances over on the
8 defense side. This is mostly, obviously, for the benefit of
9 the folks who are on the phone. Mr. Hulse, did you want to
10 acknowledge your presence?

11 MR. HULSE: Ben Hulse for the defendants. Good
12 morning.

13 THE COURT: Good morning.

14 MS. AHMANN: Bridget Ahmann for the defendants.

15 MR. GORDON: Good morning, Your Honors. Corey
16 Gordon for the defendants.

17 THE COURT: Mr. Gordon?

18 MR. GORDON: Good morning, Your Honors, Ben Gordon
19 for the plaintiffs.

20 MS. ZIMMERMAN: Good morning, Your Honors,
21 Genevieve Zimmerman for the plaintiffs.

22 MS. CONLIN: Good morning. Jan Conlin for the
23 plaintiffs.

24 THE COURT: We also have Judge Leary with us.
25 Good morning, Judge Leary. Thank you very much for coming

1 over.

2 Well, let's -- everybody on the phone able to hear
3 okay?

4 MS. GEISINGER: Yes, ma'am.

5 THE COURT: Okay. Who was that?

6 MS. GEISINGER: I'm Rae with the Whitehead Law
7 Firm.

8 THE COURT: Well, let's get right into the agenda.
9 And looking at item number 1, pretrial orders, is there
10 anything to be discussed with respect to the items that are
11 bulleted under the pretrial order section? Mr. Gordon?

12 MR. GORDON: Your Honor, if I may, plaintiffs have
13 one observation. It seems a bit of an anomaly perhaps, but
14 I'm not sure the Court considered the fact that fact
15 discovery on page 1 of the pretrial orders is to be
16 completed no later than October 16th, but the initial expert
17 reports two months later are required to be exchanged by
18 October 9th. And we're happy to provide our specific expert
19 reports on October 9th. It just creates a little bit of an
20 incongruity because that leaves another week before the end
21 of fact specific discovery during which period,
22 theoretically, events could happen that could impact the
23 opinions of those experts designated a week before.

24 So I just invite the Court's observation of that
25 and consideration. It's not that we're necessarily looking

1 for an extension, but it would seem to be more reasonable to
2 have the expert disclosures at the same time as or no
3 earlier than the close of fact specific discovery.

4 THE COURT: We'll just note the problem or the
5 issue or the fact.

6 MAGISTRATE JUDGE NOEL: If a problem arises, we'll
7 deal with it, if and when a problem arises.

8 MR. GORDON: Okay, fair enough.

9 THE COURT: But thank you for that observation.
10 Anything else? Mr. Hulse, were you just going to respond to
11 that?

12 MR. HULSE: I was, and nothing else on Section 1,
13 Your Honors.

14 THE COURT: All right. Then we'll move to the
15 plaintiff fact sheets.

16 MR. HULSE: Your Honors, the only thing I think
17 that requires discussion today is defendant's motion to
18 dismiss. We can handle that now. We can handle that later,
19 however you might prefer.

20 THE COURT: I had in mind that we'd handle that
21 after we at least do an initial run through the agenda.

22 MR. HULSE: Okay. That makes sense.

23 MS. GEISINGER: We're having a hard time hearing.

24 THE COURT: Okay, hold on one second. We have new
25 technology.

1 MS. GEISINGER: I think it's the microphone. I
2 think that would definitely help.

3 THE COURT: Oh, can you hear me? It's just
4 Mr. Hulse?

5 MS. GEISINGER: I can hear you just fine.

6 THE COURT: All right, so we'll make everybody go
7 to the podium now.

8 MR. GORDON: Your Honor, I'll note that I just
9 turned on these microphones at the table. Is that better?

10 MS. GEISINGER: That is much better. Thank you so
11 much.

12 THE COURT: Okay. And thanks for speaking up.

13 MR. HULSE: All I was going to say is that makes
14 sense, Your Honor, and we'll talk about it at the end of the
15 program.

16 THE COURT: Very well.

17 MS. GEISINGER: Thank you, Your Honor.

18 THE COURT: Mr. Gordon, do you have anything that
19 you wanted to bring up on the plaintiff fact sheets other
20 than the dismissal matter that we'll get to in a moment?

21 MR. GORDON: Well, we can argue it later, Your
22 Honor. I do just want to speak to specific issues, and I
23 think there are folks on the phone who have filed some
24 responses who may wish to be heard.

25 THE COURT: Okay. We'll take all of that up then

1 after we do the run-through.

2 MR. GORDON: Yes, Your Honor, thank you.

3 THE COURT: Well, let's talk about the number and
4 status of cases that have been transferred to the MDL.

5 MR. GORDON: Your Honor, I think that based on my
6 liaison counsel's able report, do you want to give a report
7 on that, Dave?

8 MR. SZERLAG: We just --

9 THE COURT: You have to find a microphone
10 somewhere. Good morning.

11 MR. SZERLAG: Good morning, Your Honors. David
12 Szerlag for the plaintiffs. The update as of last night on
13 cases filed in the MDL is 3,590 cases, so a little bit
14 different than what was on the joint agenda. And I'm not
15 aware of any other cases being filed in the state courts. I
16 think we're still at 56.

17 THE COURT: Okay. So 56, that's in Minnesota?

18 MR. SZERLAG: Correct.

19 THE COURT: And then the Rodriguez?

20 MR. SZERLAG: That I'm really, quite honestly, I'm
21 not prepared to talk. I believe that the information in the
22 joint agenda is correct.

23 THE COURT: Okay.

24 MAGISTRATE JUDGE NOEL: So on the 3590 number, did
25 that include all of those Missouri cases?

1 MR. SZERLAG: I believe it does, yes.

2 THE COURT: Have now been transferred, correct?

3 MR. SZERLAG: That's correct.

4 MR. HULSE: Your Honors, if I may add one point,
5 and, yes, all of Missouri cases are now transferred.
6 Washington, which was the last one, now has a motion to
7 sever that's pending. The one issue that still needs to be
8 sorted out after Washington is severed, there are still a
9 bunch of non-diverse cases in the mix that we will work with
10 plaintiffs' counsel to get those dismissed and then they'll
11 be refiled in Ramsey.

12 THE COURT: So are those the non-diverse in the
13 Missouri mix?

14 MR. HULSE: That's correct, Your Honor.

15 THE COURT: All right. So we'll look for some
16 movement on the 56 number.

17 Canada? Mister -- I looked up and Mr. Szerlag is
18 gone, but.

19 MR. BLACKWELL: There's been no new activity in
20 Canada since the last report, Your Honor.

21 THE COURT: All right. Thanks, Mr. Blackwell.

22 Well, then let's move to -- we'll skip number 6,
23 additional pretrial orders because it appears there's
24 nothing to discuss there, and we'll move to the status of
25 discovery.

1 Mr. Gordon, is there anything that you wanted to
2 talk about there?

3 MR. GORDON: Your Honor, I would just say
4 generally that discovery of the experts has been fast and
5 furious as this chart indicates and that virtually all of
6 the expert discovery, obviously, we still have case
7 specific, but the general causation has been completed with
8 the exception as noted the two depositions plaintiffs have
9 noted for the record that those may need to be re-opened or
10 extended. I believe all other depositions, unless my
11 co-counsel correct me, have been completed.

12 MS. ZIMMERMAN: Yes, Your Honor, I think that the
13 last expert deposition was last Friday the 11th, and I think
14 that we're now done with general causation expert
15 depositions.

16 THE COURT: I saw there was an asterisk indicating
17 that there might be some disagreement but I didn't see any
18 motion, so is there any action that you're looking for from
19 the Court today?

20 MS. ZIMMERMAN: No action that we're looking for
21 from the Court. There was a dispute about a responsive
22 production following a subpoena and the production
23 sufficiency with respect to a number of the experts and so
24 for that reason, there were a couple of depositions we noted
25 our disagreement there, but we have not brought a motion.

1 THE COURT: Seeking no action, you have fallen
2 right into our wheelhouse.

3 Bellwether discovery, plaintiff's further
4 statement. I just had a -- I want to make sure there's
5 nothing to discuss on this -- you see the defendant's
6 further statement there? Do you need us at all there?

7 MR. BLACKWELL: Not yet, Your Honor. We are going
8 to give this about another week to see if we can get any
9 responses from the VA. The VA is simply moving in its own
10 time and makes it difficult to get the discovery --

11 THE COURT: Huh.

12 MR. GORDON: Imagine that.

13 MR. BLACKWELL: So we are going to continue with
14 our best efforts for perhaps another week, then we may have
15 to come in to the Court to fashion some sort of remedy in
16 response to it, if we can't get our discovery.

17 THE COURT: I just wanted to make sure I wasn't
18 missing something.

19 MR. BLACKWELL: No, no, Your Honor.

20 MS. AHMANN: Your Honor, we do have one open
21 issue.

22 THE COURT: Ms. Ahmann.

23 MS. AHMANN: Thank you. We have run into some
24 issues with regard to contacts to treaters in terms of going
25 forward with discovery. Currently, we don't have any

1 depositions scheduled of treaters. And we consistent with,
2 quite frankly, my practice, we started contacting the
3 treaters after we weren't getting specific dates from the
4 plaintiffs. And the plaintiffs do not want us to do that,
5 and so there has been back and forth with regard to whether
6 or not we can be even contacting them for scheduling
7 purposes. But we continue to try and get dates, and we will
8 continue to work with them, and I think we've resolved kind
9 of that issue on scheduling. And they may differ on that,
10 and I'll let them speak to that.

11 We also though in light of Magistrate Noel's
12 recent order with regard to the whole Shady Grove issue of
13 federal versus state issues, we think that there is a good
14 argument, and we're in a good position to say that there can
15 be no prohibition on contacts generally because the federal
16 rules don't provide for it.

17 THE COURT: It might not be there anyway. It
18 could just be an issue of you assuring the plaintiffs that
19 you're only contacting the treaters for scheduling purposes
20 and not for anything substantive. And in that case, you
21 would not --

22 MS. AHMANN: In that case, we wouldn't. But, Your
23 Honor, in light of Magistrate Judge Noel's Order, I think we
24 feel like we might want to see where the Court comes out on
25 the whole issue of contacts generally and whether or not

1 there is -- whether or not the procedures would allow for us
2 to actually contact and talk with treaters.

3 THE COURT: So do you want to wait for --

4 MS. AHMANN: Well, what --

5 THE COURT: -- to schedule, just to find out if
6 you can have substantive communications at the same time?

7 MS. AHMANN: What we would like is we would like
8 to get some guidance from Magistrate Judge Noel as to how if
9 we could get this on for like an expedited consideration for
10 him regarding contacts to treaters and not just for
11 scheduling, for substantive issues.

12 THE COURT: Is there a motion?

13 MS. AHMANN: Well, we would make a motion, and I
14 know Ben has talked about it, but we'd like some guidance
15 because timing is kind of an issue at this point.

16 MAGISTRATE JUDGE NOEL: I think the short answer
17 from my perspective is when we're done here, I'll call down
18 to my chambers and see what I can do about getting a date
19 and time and then you make a motion. Just as a preview,
20 what Rule of Civil Procedure do you think might govern this?

21 MS. AHMANN: Well, I think the position is that
22 there is no rule that would govern this. Nothing to
23 preclude it, which in effect means that it allows it. And I
24 won't make my argument here, but, and we also -- there is an
25 MDL decision out of the Northern District of Illinois in the

1 NexGen litigation where the Court did find that not citing
2 to *Shady Grove*, but did find the issues of procedure, which
3 discovery procedure fell within that are governed by federal
4 laws and procedures rather than state. And so in that case,
5 they, you know, they decided that it was okay. It was a
6 somewhat different situation.

7 THE COURT: Was there a privilege involved there
8 at all potentially?

9 MS. AHMANN: The privilege is substantive, but the
10 issue of how you go about, you know, how the privilege is
11 protected and stuff is procedural, and so we'd like the
12 opportunity to present that to the Court. So we'll wait and
13 set it on for hearing if appropriate.

14 THE COURT: All right. And none of this comes as
15 any kind of a surprise to the plaintiffs' side, right?

16 MR. GORDON: No, Your Honor, but I would like to
17 be heard briefly on it, if I might.

18 THE COURT: I thought you might.

19 MR. GORDON: Your Honor, thank you. Ben Gordon
20 for the plaintiffs. Briefly, let me state first that I
21 think Ms. Ahmann's request is essentially for an advisory
22 opinion at this point. I realize time is of the essence
23 here. So I do want to point out, and we can certainly brief
24 this and are prepared to brief it and argue it later, but in
25 response specifically to Ms. Ahmann's comments, I want to

1 say, number one, that substantive ex parte communications
2 with prescribing, treating health care providers by the
3 defense violates the physician-patient relationship. And,
4 specifically, it violates Minnesota law, substantive law in
5 that respect. And as she indicated, I believe, Ms. Ahmann,
6 there is no federal rule on this point concerning privilege
7 relating to physician health care providers and patients,
8 and as such, there is not a conflict Minnesota law governs
9 and, specifically, the Baycol decision in this district is
10 right on point.

11 I admit that's pre-Shady Grove, but if you read
12 Your Honor's analysis, which we can again brief in the
13 Baycol decision, they make very clear that you have to look
14 beyond the fact that on its surface the Minnesota law, I
15 think it's Chapter 554 -- I can pull it, but I think
16 actually it's 595.02, prescribes the process.

17 But the Court addresses specifically the nature of
18 the conduct that the process governs, and it goes right to
19 the core of the plaintiffs' medical condition and the
20 plaintiffs' claims in the case. And so that decision in
21 this district, the Court very emphatically decided in favor
22 under Erie analysis pre-Shady Grove that the substantive law
23 of Minnesota would govern and prohibit, prescribe those
24 contacts of any kind absent a waiver.

25 Now, here we have a waiver in the *Nugier* case and

1 the *Kamke* case with the two first bellwether cases we have
2 limited releases of medical information. By their own
3 language, they are limited to the information containing
4 medical records, which we're happy to give the defendants
5 and have. In terms of, so bottom line is --

6 THE COURT: Hold on one second.

7 (Judges conferring.)

8 (In open court.)

9 THE COURT: So we don't really need Baycol or
10 anything. And Rule 501 says in a civil case the state law
11 governs privilege regarding a claim where the state law
12 provides a rule of decision. That's what you're talking
13 about.

14 MR. GORDON: Exactly, Your Honor.

15 THE COURT: Yeah. We're not going to talk about
16 that substantively.

17 MAGISTRATE JUDGE NOEL: I was just going to say
18 you folks are, Ms. Ahmann and Mr. Gordon are well ahead of
19 me at least in terms of this issue. I'm happy to hear it
20 and look forward to whatever briefing may come my way on it,
21 but I don't think we need to rule on it right now.

22 MR. GORDON: Understood, Your Honor.

23 THE COURT: No, I just wanted to --

24 MR. GORDON: I just wanted to respond to those
25 points of Ms. Ahmann, just so it was clear for the record.

1 And I will say, Your Honors, to the extent, and I think we
2 tried to Ms. Muscle or Mr. Blackwell may have indicated
3 this, if we can reach an agreement that is non-substantive,
4 that is scheduling only staff contacting physicians, which
5 has gone on already by both sides, and we're trying to work
6 together. We're happy to do that and see if we can get
7 these depositions scheduled, so that this isn't even an
8 issue for the Court. The larger issue is not ripe for
9 review I agree at this point.

10 THE COURT: So I was only trying to make sure that
11 I understand the scope of what might be brought in the
12 motion. There's no -- you wouldn't have to agree on the
13 propriety of scheduling contact, right?

14 MR. GORDON: I would say, Your Honor, as long as
15 it is clear that the scheduling is not counsel but is staff,
16 because even some of the case law that I'm prepared to cite
17 the Court to including an MDL --

18 THE COURT: But that's all just to protect against
19 substantive conversation.

20 MR. GORDON: Precisely. But sometimes there can
21 be bleed over. There can be concern over reaching too far.
22 A physician picks up the phone and says, hey, what is this
23 all about? This kind of thing. As long as we're clear that
24 that can't happen right now and that the defendants haven't
25 done that and don't intend to, then we're fine with where

1 the status quo is at this time, and I'm happy to work with
2 them. Thank you, Your Honor.

3 THE COURT: Ms. Ahmann?

4 MS. AHMANN: And, Your Honors, we did agree that
5 pending any further decision by the Court that we would
6 limit it to what we've been doing, which is just talking to
7 office personnel about scheduling.

8 THE COURT: Yes, and I just wanted to make sure
9 that you didn't think that you had to hold off on that
10 pending some action by the Court, and I think that that is
11 now clear.

12 Okay. And continued general causation, discovery,
13 there's nothing to be done on that at this moment, correct?

14 MAGISTRATE JUDGE NOEL: Correct. I guess I would
15 just observe, and I have not set up a thing with telephones
16 this afternoon, so I anticipate only Dr. Augustine's counsel
17 and defense counsel being there at 1:30 for the hearing on
18 this further discovery into Dr. Augustine's latest article.

19 MS. ZIMMERMAN: Your Honors, plaintiffs' counsel
20 has also filed a motion on point and will be present as
21 well.

22 MAGISTRATE JUDGE NOEL: Okay.

23 MS. ZIMMERMAN: Or response issues.

24 MR. BLACKWELL: Otherwise agreed, Your Honor.

25 MAGISTRATE JUDGE NOEL: Okay.

1 THE COURT: It is all right with me. I was just
2 going to point out to the cousins that he's always this
3 brief and concise.

4 All right. Well, let's move then to the
5 dismissals, right? All right.

6 MR. HULSE: Good morning, again, Your Honors.
7 This motion, this is the third motion to dismiss based on
8 PFS deficiencies brought by the defendants. Because this is
9 a larger group, 22, we've prepared a chart, which we
10 provided to plaintiffs' counsel the status of each one of
11 these. There are a few we're no longer seeking dismissal on
12 based on the responses that have come in. And with the
13 Court's permission, I would hand up a copy to your clerk as
14 a guide to the motion.

15 THE COURT: Please.

16 MR. HULSE: Is that all right? And I did note on
17 here one error that the plaintiffs' counsel point out, one
18 case where we did withdraw the motion per our letter we
19 sent, and I have handwritten that in to what I'm providing
20 you right now.

21 THE COURT: Okay. Could you give me one? How
22 many copies do you have in your hand?

23 MR. HULSE: I have two in my hand, and I'll be
24 happy to provide those.

25 THE COURT: Okay, two will have to do for the

1 moment.

2 MR. HULSE: And I have more back at the table if
3 you'd like.

4 MR. GORDON: And, Your Honor, so it's clear for
5 the record, I would like to inquire is that the Hood case?

6 MR. HULSE: That's the Hood case. That's exactly
7 right, which we're no longer seeking dismissal on. And so,
8 Your Honor, most of these cases fall into the category of
9 the Spiech case, which the Court dismissed in the last round
10 where the plaintiffs' counsel say they've attempted contact
11 with the -- they don't dispute the deficiencies exist. They
12 have not had contact with the plaintiff for six months, nine
13 months, 12 months despite multiple attempts. And there's no
14 indication that the PFS is or the amendments to the PFS are
15 forthcoming, and so like the Spiech case, we seek dismissal
16 on that basis.

17 A couple that I just wanted to note because it's a
18 different issue that has come up before, there are a couple
19 of cases in group 3, the persistent PFS deficiencies where
20 the plaintiffs' response came in only last night.

21 THE COURT: Last night?

22 MR. HULSE: Last night, that's right. And under
23 PTO-14, it's clear that the plaintiffs, if they're going to
24 oppose one of these motions, must file their opposition
25 seven days before the status conference. These concern a

1 couple of cases from the Levin Papantonio firm. Levin
2 Papantonio negotiated PTO-14 with the defense counsel, and
3 so they're well aware of this deadline. And our viewpoint
4 is that plaintiffs need to be held to the response deadline.
5 It can't be ignored. And so even if there's a cure or
6 partial cure that comes in with the opposition that they
7 still should be dismissed with prejudice because they didn't
8 comply with PTO-14s briefing deadline. But, otherwise, we
9 rest on the chart that I provided, Your Honor.

10 THE COURT: When did you put this chart together?

11 MR. HULSE: Last night.

12 THE COURT: What time?

13 MR. HULSE: At 5:00.

14 THE COURT: So it didn't come in, it didn't come
15 dark of night. They came in --

16 MR. HULSE: No, they came in at 7:30, and so I
17 added those in this morning. It's the very last page of the
18 chart.

19 THE COURT: I see that. I just wondered how late
20 it was. I just wondered if it was --

21 MR. HULSE: Yeah, 7:30. I was at the Guthrie, and
22 it was just as the curtain was going up at 7:30.

23 THE COURT: What did you see?

24 MR. HULSE: Native Gardens. It's about neighbors
25 that don't get along.

1 MAGISTRATE JUDGE NOEL: Did you see it or did you
2 leave as soon as you got the text?

3 MR. HULSE: I might have been looking at my phone
4 while the play was going on.

5 THE COURT: Well, there's no intermission in that
6 play.

7 MR. HULSE: There is no intermission in that play.

8 THE COURT: So you're stuck.

9 MAGISTRATE JUDGE NOEL: And I believe they make an
10 announcement about turning off your devices before they
11 begin.

12 MR. HULSE: I know, and I do see that as a
13 potential consideration on our motion here, Your Honors, so.

14 THE COURT: You walked into a buzz saw without
15 even, we're going to saw down your oak tree.

16 MR. HULSE: I know.

17 THE COURT: I'm just testing you to see if you
18 actually watched the play.

19 MR. HULSE: I did. It was pretty good, Your
20 Honor.

21 THE COURT: That was a pretty vague comment. I
22 don't think he understood the oak tree thing.

23 MR. HULSE: And, Your Honor, it was the Brannon
24 and Pettersen cases that are on the page 4.

25 THE COURT: So 16-275 and 16-221.

1 MR. GORDON: And those are my cases, Your Honor,
2 and I'm prepared to address it.

3 MR. HULSE: And I updated the chart this morning
4 to reflect that they came in last night.

5 (Judges conferring.)

6 (Law clerk turns judges' mic off.)

7 MAGISTRATE JUDGE NOEL: Here we thought we were
8 being secretive.

9 THE COURT: Okay. Only the people on the phone
10 can hear us.

11 (Laughter)

12 MR. HULSE: I feel like I'm in an isolation booth
13 on the game show.

14 THE COURT: Mr. Hulse, the law firm that you made
15 reference to that I thought you said is the firm that
16 submitted this last night.

17 MR. HULSE: Yes.

18 THE COURT: That must be from Miller, Nadeau,
19 Newcomb and Novak, right? Because I think Mr. Gordon just
20 said that he represents Brannon and Pettersen.

21 MR. GORDON: All six of those, in fact, Your
22 Honor, are Levin Papantonio cases. There are two different
23 categories though; the four are in one category, and the two
24 --

25 THE COURT: Oh, yeah, okay, got it, and that's

1 your firm anyway.

2 MR. GORDON: Yes, Your Honor.

3 MR. HULSE: Yes, Your Honor.

4 THE COURT: Any cloud has been lifted. The scales
5 have fallen from the eyes, yes.

6 MR. HULSE: The oak tree has been left standing.

7 THE COURT: Okay. Let's see if Mr. Gordon has
8 anything that he wants to say before we determine whether we
9 should just go to these case-by-case then.

10 MR. GORDON: I'm happy to share the podium with
11 you if that facilitates whatever informal response.

12 Your Honors, I'd like to say first, generally, and
13 I understand there's been a lot of history to this, and Your
14 Honor has dismissed some cases in certain categories and
15 that's likely to happen today. But I would like to at least
16 say first that this PFS process is a cumbersome and
17 complicated process and a very time-consuming and
18 painstaking on behalf of the defendants and plaintiffs'
19 counsel.

20 There's one very good example of that. Just this
21 morning as we walked into the courtroom, and I was handed
22 this list, I observed with Ms. Zimmerman's list, that the
23 Hood case, which counsel spoke to, which we all agreed was
24 on here by mistake, never should have been on the motion to
25 begin with, was still on the list. So the point I'm making,

1 Your Honors, is it's not easy for counsel for the defense or
2 for us to always comply to the letter with everything
3 required of PTO-14 under the PFS process.

4 I will say, Your Honors, we are all going to be
5 very diligent and using best efforts to get this done in a
6 timely fashion, and I think counsel will concede that we're
7 working together on it. I'm not saying that our cases,
8 including the four Your Honor mentioned from my firm, that
9 the plaintiffs are essentially AWOL, Absent Without Leave.
10 And there are others from the Bernstein Liebhard firm, and
11 they may wish to be heard. Dae Lee is on the phone. I know
12 three of those I believe. There are other cases that are in
13 that same category where after a period of months the
14 plaintiffs have simply been nonresponsive.

15 In essence, I would, as I did here a couple of
16 months ago, urge the Court to consider leniency and
17 understanding that this a complicated process and give these
18 plaintiffs one last effort to meet their requirement to
19 provide this PFS. And I would just fall on my sword and ask
20 the Court to consider that as a last effort for these
21 plaintiffs.

22 In the other category, the category such as
23 Pettersen and Brannon, we did file our response. I'm not
24 sure about the timing response. Mr. Nigh in my office filed
25 that and those cases are a very different circumstance.

1 The, you know, they've been at various levels of compliance.
2 There's a contention now by Mr. Hulse, I believe, that the
3 medical authorization itself is somehow non-compliant. I'm
4 not clear on how that is, but my point is we certainly have
5 worked with him on that case, the Brannon case, to comply,
6 and I believe we are in compliance now to the extent that we
7 may not be one hundred percent compliance, it's a
8 non-substantive, non-serious issue that we can fix
9 administratively, if that's all it is.

10 With respect to the Pettersen case, it's a little
11 different, Your Honor. Mr. Pettersen is in hospice. He's
12 not dying, but his infections have gotten so bad, my
13 understanding from talking to the medical staff is that he
14 can't get on the phone right now. He is in 24 hour
15 infection control care and can't do this right now, and they
16 offered 30 days as an alternative. Maybe that can be
17 enough. We can't even get him on the phone right now
18 because he's in hospice because of how rampant this
19 infection is.

20 THE COURT: When did he go into hospice?

21 MR. GORDON: I don't exactly know, but it's been a
22 fairly lengthy period of time. We've been trying to reach
23 him for at least the last -- I don't want to tell you
24 wrongly. I can find that out from my colleague Mr. Nigh,
25 but I believe it's been at least the last month or so, maybe

1 even longer. I can get you a definite answer to that.

2 But in that case, and in Brannon in particular and
3 cases like that, I would suggest to Your Honor that it's a
4 harsh result, the harshest result to dismiss with prejudice
5 the case of a plaintiff who is either in compliance or
6 trying very diligently to get into compliance.

7 THE COURT: Well, let's go through and make sure
8 we know which ones are -- yeah, okay. So let's isolate the
9 cases that fall into the first category first, and that
10 would be Perez. Somebody say yes or no.

11 MR. HULSE: Yes, Your Honor.

12 MR. GORDON: Yes, Your Honor.

13 THE COURT: Raymond?

14 MR. HULSE: Yes.

15 MR. GORDON: Yes.

16 THE COURT: Sanders?

17 MR. GORDON: Yes.

18 THE COURT: I skipped Butkus because that's a
19 separate --

20 MR. HULSE: That's correct, Your Honor.

21 MR. GORDON: I believe a response of some kind has
22 been filed.

23 THE COURT: I just wanted to let you know I didn't
24 skip that by accident. Stouffer?

25 MR. HULSE: Correct, Your Honor.

1 MR. GORDON: Yes.

2 THE COURT: Miller?

3 MR. GORDON: Yes, I think that's right, Your
4 Honor. I think that's in the same category.

5 THE COURT: Nadeau?

6 MR. GORDON: Yes, Your Honor.

7 THE COURT: Newcomb?

8 MR. GORDON: Yes, Your Honor.

9 THE COURT: And Novak?

10 MR. GORDON: Yes, Your Honor, those four are mine.

11 MR. HULSE: Yes, Your Honor.

12 THE COURT: Anybody else? Buttacavoli?

13 MR. HULSE: Buttacavoli has been dismissed.

14 THE COURT: Is off anyway.

15 MR. HULSE: Correct.

16 THE COURT: Burks you're not moving on right now.

17 MR. HULSE: Correct. McGee is the other one that
18 was dismissed with prejudice, by stipulation.

19 THE COURT: Which one?

20 MR. HULSE: Magee. It's on list 2.

21 THE COURT: There it is. That's out. And
22 Starnes?

23 MR. HULSE: No opposition filed.

24 MR. GORDON: Your Honor, Mr. Parekh of our
25 Executive Committee represents the Starnes case and that is

1 in that same category of cases that through diligent effort
2 the plaintiff has been nonresponsive.

3 THE COURT: So that will be dismissed as well.

4 What about Upton?

5 MR. GORDON: Your Honor, I believe the Kennedy
6 Hodges firm has filed a response on that one and others, am
7 I correct? I think Donald Green --

8 MR. HULSE: That's correct. Yes, Rivers and Upton
9 are ones where it turns out that the plaintiff had died
10 about nine months ago. PFSs were still submitted. No date
11 of death was provided on the PFSs. We were not informed
12 that they had died, and we just learned it through the
13 oppositions that were filed.

14 MR. GORDON: I'm not aware, Your Honor, if there's
15 a rule or law that requires a notice of suggestion of death.
16 I think the complication of that is that it takes time when
17 people die to figure out what happened to them, and it took
18 many months to figure out that to family members that the
19 plaintiff had actually passed away. Some states, as Your
20 Honors are well aware, do allow, Florida does and I believe
21 Texas does, and other states allow a survival action even if
22 it's not necessarily a wrongful death case, and so those
23 plaintiffs still have substantive rights. But the exigency
24 of death that prevented both sides from understanding what
25 had happened for a period of time is the reason that those

1 were delayed so long, and we would ask those plaintiffs to
2 give a limited period of time to contact the families and
3 see if they want to pursue their action.

4 MR. HULSE: Your Honor, the problem here is that
5 the plaintiffs' counsel state that they were aware of these
6 deaths in November of 2016, and several months later they
7 submitted PFSs on behalf of these individuals. The PFS
8 itself does not ever disclose that the person had died. The
9 PFS asked to state the death and address and the place of
10 death. It's not stated. It's just indicated as unknown.
11 Perhaps that was meant as a hint that they had died, that
12 date and address and place of death unknown, but you would
13 think that we know that that was known to plaintiffs'
14 counsel at the time that these PFSs were submitted, so --

15 MAGISTRATE JUDGE NOEL: Is there an entry on the
16 PFS for alive or dead?

17 MR. HULSE: It's, no, the question is if you
18 represent a decedent's estate, state the date and address of
19 the place of death, and it simply states "unknown." But
20 there is not otherwise a question --

21 MAGISTRATE JUDGE NOEL: I guess where would a
22 plaintiff submitting a PFS indicate that they were dead if
23 there was not yet an estate established?

24 MR. HULSE: In that question. Oh, if there is not
25 yet an estate established?

1 MAGISTRATE JUDGE NOEL: So if a guy dies
2 yesterday, his PFS is due today, where do you put down, "oh,
3 by the way he's dead?"

4 MR. HULSE: That isn't a specific question in the
5 PFS.

6 MAGISTRATE JUDGE NOEL: Okay.

7 MR. GORDON: That's a great question, Your Honor.
8 Perhaps we can try to include a question on that so that in
9 the case where a person representative has been appointed,
10 you know, that there's a duty on behalf of counsel to notify
11 or to find that out and to notify the other side of it.

12 THE COURT: But there has to be something,
13 otherwise, you can't be submitting a PFS on behalf of a
14 deceased individual without some kind of a -- something that
15 it strikes me would, you know, in a fair reading of the
16 plaintiff fact sheet, you might not actually represent the
17 estate, but by some authority, you are signing for the
18 deceased. So, boy, I mean just this wasn't you, Mr. Gordon.

19 MR. GORDON: No, I don't know the intimate details
20 of these cases, and we couldn't get others to speak to
21 those, so I don't want to speak out of school. But I would
22 think that if that had happened to me, those were probably
23 the ones where the plaintiff's fact sheet was not verified
24 because they couldn't get anyone to do so at that time, and
25 the staff for that law firm was doing their utmost to

1 complete the PFS based on the medical records that they had
2 received from doctors and to get it as complete as possible
3 up to the point where the plaintiff was lost to contact and
4 they were trying to figure out what happened.

5 THE COURT: So it was related to what we talked
6 about some time ago about the utility or nonutility of
7 verification?

8 MR. GORDON: Indirectly, yes, Your Honor, I
9 suppose in those cases, a verification and re-verification
10 would be important, and we're doing that, doing our utmost
11 to do that now.

12 MR. HULSE: Your Honor, you would just think that
13 sometime in the last six, seven or eight months that there
14 would have been either an amendment to the PFS or some
15 indication that's given to defense counsel that this person
16 had died. As this point, it may turn out that there are
17 many people in the pool of cases that this applies to, but
18 the first time that we became aware of this specific kind of
19 situation was these two cases where we only learned through
20 the opposition motion to dismiss that the person has died
21 nine months ago.

22 MR. GORDON: And, Your Honors, I guess I would
23 just --

24 THE COURT: Hold on a second. Is the lawyer on
25 the phone for Rivers and Upton?

1 MR. HULSE: Mr. Assaad is here, I believe, or
2 Mr. Hodges, I guess.

3 MR. HODGES: Yeah, Your Honor, I can speak to
4 that, although my associate was the one that was
5 communicating with the family.

6 THE COURT: This is David Hodges.

7 MR. HODGES: Yes, Your Honor. David Hodges on
8 behalf of those plaintiffs. I will say that as I recall
9 under these circumstances where someone dies, we don't get a
10 phone call the next day saying, hey, this person has died.
11 Often when we reach a relative, their intent is at that
12 point not clearly established on whether they're going to
13 proceed. And when they have told us, yes, I want to
14 proceed, I'm going through probate or I'm going to be
15 appointed the administrator, we're waiting for that to
16 happen. So I think that helps to explain the delay in a
17 case like this. And I think when you put on the PFS, the
18 only spot you can date of death unknown, it's clear the
19 person is dead.

20 THE COURT: But what about the verification
21 aspect?

22 MR. HODGES: I think those were unverified, Your
23 Honor. They were filed unverified.

24 THE COURT: But pursuant to what authority would a
25 law firm file a PFS on behalf of a deceased individual

1 without getting some, I guess, by what authority can you
2 file something on behalf of somebody who is no longer with
3 us?

4 MR. HODGES: Well, actually we were given
5 authority by the decedent to act on their behalf, and we
6 have a duty to preserve the claim. We have to file
7 something, of course.

8 THE COURT: Right, but once you find out that the
9 person isn't alive anymore, then isn't there an obligation
10 to correct what you -- I mean you wouldn't know at the time.
11 You're given the authority. You file it, of course, you
12 would. You don't immediately find out that the person has
13 died because why would you be the first person that the
14 bereaved family would call?

15 MR. HODGES: Right.

16 THE COURT: But once you find out after you have
17 filed something on behalf of somebody who is dead and
18 couldn't actually authorize it at the time, isn't there an
19 obligation to do something about that rather than just
20 letting that apparent authorized statement sit out there?
21 You know to say, okay, it turns out the person was dead at
22 the time, but we still think that they might -- that they
23 might want to pursue it, so here's what we're doing. It's
24 just to let all of the months go by while you and only you
25 in the context of a case know that there may or may not be

1 authority to proceed on that case's behalf.

2 MR. HODGES: Yeah. Your Honor, I'm not aware of
3 any requirement that would require us then to communicate
4 with the defendant our communications with the family at
5 that point as far as moving forward. And I think it really
6 also varies state to state as far as who can continue those
7 substantive claims. Sometimes an administrator may need to
8 be appointed, sometimes not.

9 THE COURT: What was the date? Wasn't there a
10 requirement for verification that came and went at some
11 point in there?

12 MR. HULSE: Well, the requirement is that the PFS
13 be verified at the time it's submitted and then we had
14 argument a few months ago where the Court made clear it
15 wasn't going to release any of the plaintiffs from the
16 obligation to verify both original and amended responses.

17 THE COURT: Right. So it's that -- at that point,
18 I mean there have been, what, at least a couple of months
19 that have gone by since the requirement of verification was,
20 -- what's the word -- not "emphasized," but that it was made
21 clear that that requirement was not going away, and so that
22 only relates to the timeliness of the responses.

23 So what is the situation with Rivers? How close
24 are we to getting an answer on that?

25 MR. HODGES: I don't know the answer to that, Your

1 Honor. I would have to ask my associate about that.

2 THE COURT: And same with Upton?

3 MR. HODGES: Same thing.

4 THE COURT: Okay. Thanks very much.

5 MR. HULSE: Your Honor, if I could just add one
6 thing. The oppositions that were filed by Mr. Hodges' firm
7 both state that they had contact with a relative in November
8 of 2016 where they were informed that the plaintiff had
9 died. So they were aware of this several months before they
10 submitted the PFS's on behalf of those plaintiffs.

11 MR. GORDON: Well, I would just say in response
12 again, Your Honor, that period of time where it takes a lot
13 of time sometimes not the first priority is an ongoing
14 lawsuit to figure out if the plaintiff, whoever that is,
15 under the wrongful death law of that state or the other law
16 of that state in terms of probate matters wants to pursue it
17 or not, and what the process is for that. It can be a
18 time-consuming process.

19 So I would just ask that I don't think there's any
20 real prejudice to 3M in these two cases, but those
21 plaintiffs be given, you know, and the law firm to be given
22 30 days to figure out if they want to pursue it or not, and
23 if so, to comply fully with the PFS. And if they cannot,
24 then the court case will be subject to dismissal.

25 MAGISTRATE JUDGE NOEL: If the plaintiff were

1 alive, what's the date on which this verification or
2 re-verification should have occurred?

3 MR. GORDON: Sorry, Your Honor. At the time they
4 submit the PFS, they have to sign it verifying the answers
5 are true and accurate. If they are new ones, then they have
6 to re-verify based on --

7 MAGISTRATE JUDGE NOEL: And that is a deficiency
8 upon which you are relying?

9 MR. HULSE: Correct.

10 MAGISTRATE JUDGE NOEL: Okay.

11 MR. HULSE: Yes. And so verifications, the PFSs
12 and the verifications were due in fact in December of last
13 year because these were early filed cases.

14 THE COURT: And then I'm saying to the extent
15 there might have been a question about whether the
16 requirement for verification could have been lifted, any
17 confusion about that was removed when we ruled a couple
18 months ago.

19 MR. HULSE: In fact, Your Honor, there's never
20 been a dispute that the original PFS, and this is what we're
21 talking about here, the original PFS had to be verified.

22 THE COURT: But they might say that there's an
23 amendment in that the person has died now.

24 MR. HULSE: Yes, and that's been clear for a
25 couple of months.

1 THE COURT: All right.

2 MR. GORDON: Your Honor, if I could go back to
3 Brannon for one moment and just mention I've been notified
4 by my partner at the office who filed our response that the
5 Complaint over, which is pointed out in this chart on
6 page 4, the concern over a noncompliant medical
7 authorization appears to be some kind of electronic glitch.
8 We believe the authorization is accurate and complete and
9 compliant, but because I believe 3M or the defense counsel
10 uses some kind of a robo process.

11 MR. HULSE: It's plaintiffs' counsel process, not
12 ours.

13 MR. GORDON: It's a process for both sides. I
14 think the fact is I think there's a process by which you
15 review these for deficiencies is an automated process, is it
16 not?

17 MR. HULSE: No, humans do it.

18 MR. GORDON: Okay, all of it. Okay, well, my
19 understanding was that there was some automation because
20 sometimes we get boilerplate --

21 THE COURT: Are you talking about Brannon?

22 MR. GORDON: Yes, Your Honor.

23 THE COURT: Okay, I'm not ready to move to Brannon
24 yet anyway.

25 MR. GORDON: Okay. Thank you, Your Honor.

1 THE COURT: With respect to Rivers and Upton, I
2 will stay a dismissal order for two weeks and give counsel
3 the opportunity to submit persuasive argument or
4 documentation with respect to why they -- why the dismissal
5 order should not be entered.

6 And I am concerned about the potential misleading
7 nature of the PFS at the time it was submitted, and the
8 authority under which the PFS was submitted, if in fact
9 counsel knew that the injured people had died, and they
10 didn't actually have authority, and we don't still know
11 what's going to happen. So I'll give two weeks to stay
12 that, but two weeks from today the dismissals will be issued
13 otherwise in Rivers and Upton, so that then leads us.

14 MR. GORDON: Thank you, Your Honor.

15 THE COURT: Now we can talk about others. And,
16 Mr. Gordon, you want to talk about Brannon, but what you
17 want to say is that it was really on time. Maybe,
18 Mr. Hulse, you're going to withdraw your motion to dismiss
19 on Brannon. I don't know.

20 MR. HULSE: What we're asking, Your Honor, is that
21 PTO-14's requirement that an opposition be filed seven days
22 before the status conference is enforced.

23 THE COURT: What if he really did it, and it's
24 some kind of a computer glitch?

25 MR. HULSE: Well, I'm sure that we wouldn't move

1 to dismiss in a situation like that.

2 THE COURT: Okay, so we'll just hold off and see
3 -- well, no. Forget I said that. We'll just --

4 MR. HULSE: I think the suggestion was that the
5 issue with the authorization was a computer glitch, not that
6 the late submission of the opposition was a computer glitch.

7 THE COURT: I see. Is that what you said,
8 Mr. Gordon?

9 MR. GORDON: That's right, Your Honor. If the
10 response motion was not timely filed, that is a clerical
11 error on our part. It should have been filed on time, and
12 we would ask the Court's indulgence on that, but my point is
13 that it is fully compliant now.

14 The question here with the medical authorization,
15 I think it's some kind of a perhaps a computer glitch. I'll
16 look into that further, but we believe they have a full
17 medical authorization. And if they don't, we can get to the
18 bottom of that very easily.

19 All right. Let's go to Butkus, 16-4353.

20 MR. HULSE: All right. We did get a PFS, an
21 unverified and incomplete PFS in on Friday after the
22 opposition deadline. Plaintiffs' counsel indicates in their
23 submission that they haven't had any contact with the
24 plaintiff since April 6th of 2017, despite many attempts.
25 And so they submitted an unverified PFS based on the

1 information that they had in their records. There's no
2 statement or evidence that he's got any, Mr. Butkus has any
3 hardship right now that would make it impossible for him to
4 comply with PTO-14. I don't think there's really any
5 serious dispute that what's been submitted on his behalf
6 doesn't comply with PTO-14, so we'd ask that case be
7 dismissed with prejudice as well.

8 MR. GORDON: And, Your Honor, this is not my case.
9 I believe the McGlynn law firm filed a response. They may
10 have someone on the phone who may wish to be heard.

11 THE COURT: Anyone from the McGlynn firm we're
12 talking about 16CV4353?

13 MR. GORDON: The Butkus case, anyone?

14 THE COURT: I hear nothing.

15 MR. GORDON: It does appear that Mr. Butkus faces
16 some kind of hardships presently. I don't know what those
17 are. I can't speak to the specific facts. But to the
18 extent that he faces real hardships and is trying to comply,
19 we would ask the Court to give him some period of time to
20 try to do that.

21 MR. HULSE: And to be clear, what the plaintiff's
22 opposition says is that as of the last contact he was having
23 financial hardship, and also that his wife had been
24 diagnosed recently with MS. That's the last contact that's
25 described. And while those are no doubt serious issues,

1 there's no showing that there's any kind of present
2 hardship. And in fact, there's been no contact at all with
3 this plaintiff according to his counsel's submission for
4 four months.

5 THE COURT: And what came in on Friday was
6 unverified.

7 MR. HULSE: Unverified and incomplete. Extremely
8 incomplete.

9 THE COURT: Okay, that case is dismissed.
10 Busby, 16-2156.

11 MR. HULSE: Your Honor, I suggest that this is
12 like the other cases where plaintiffs' counsel say they've
13 tried to -- they don't dispute the deficiencies. They say
14 they've tried to contact their client for many months and
15 have been unable to, so this one, like the ones in the first
16 group, should be dismissed with prejudice. Here, there's
17 been no contact since March 21 of 2017, according to the
18 plaintiffs' submission.

19 MR. GORDON: If I may confer for one moment, Your
20 Honor?

21 (Off the record discussion between Mr. Gordon and
22 plaintiffs' counsel.)

23 MR. GORDON: Your Honor, I think those cases are
24 the Kennedy Hodges firm cases. As we've argued before,
25 those plaintiffs have been difficult to reach and elicit

1 full compliance. We would ask that they be given a period
2 of time if the Court would indulge them, and beyond that, I
3 can't speak to the specifics of why those plaintiffs have
4 not complied.

5 THE COURT: Dismissed.

6 MR. HULSE: Your Honors, Davis is the same
7 situation there. There's been no contact with the plaintiff
8 since August of 2016.

9 MR. GORDON: When I said "those," I thought we
10 were talking about both Busby and Davis.

11 THE COURT: Okay. They are dismissed. Gill?

12 MR. HULSE: No opposition filed.

13 THE COURT: Anybody on the phone for Gill?
14 16-4412? Gill is dismissed. Hartzel?

15 MR. HULSE: Same situation, Your Honor, as Busby
16 and Davis. No contact with the plaintiff since November
17 30th of 2016.

18 THE COURT: Anybody want to talk about Hartzel,
19 16-1338?

20 MR. GORDON: Same situation, Your Honor.

21 THE COURT: Dismissed.

22 MR. HULSE: We've discussed Rivers and Upton.

23 THE COURT: And Hood, of course. Starnes? Nope,
24 no need to talk about Starnes.

25 Okay, then Brannon, which we have talked about.

1 Have we squeezed all the juice out of the Brannon apple?

2 MR. GORDON: Well, it depends on you, Your Honor.

3 I believe we have complied. We were late. We have done our
4 best to comply as promptly as possible. We believe we're in
5 compliance now. If there is some irregularity to the
6 medical authorization, we will ask you to correct that
7 immediately. We will ask you not to dismiss that case.

8 THE COURT: But you can't think you're in
9 compliance because it's not verified.

10 MR. GORDON: I believe it is verified, Your Honor.

11 MR. HULSE: We do have a verification with this.
12 We have the formal medical authorization. Our primary
13 reason that we're seeking dismissal is we think that the
14 deadline, which again was negotiated by Mr. Gordon for the
15 opposition dates, should be enforced.

16 MR. GORDON: Your Honor, we respect deadlines and
17 we do our dead level best to meet them, and I will say we
18 cannot always --

19 THE COURT: Just -- is there any specific
20 prejudice? I mean I know that there would be prejudice if
21 we just start disregarding time deadlines but is there
22 anything in particular about the Brannon case that would
23 cause problems if we -- I'm inclined not to dismiss Brannon
24 right now.

25 MR. HULSE: Right. You've heard my argument.

1 Other than my personal inconvenience in having to look at
2 read objections that come in late the night before, there's
3 no other prejudice.

4 THE COURT: So we'll have a new category on ECF
5 that is "CFYP," for "Court Feels Your Pain." But that
6 motion is denied without prejudice to renew if there are
7 additional problems that come up. And then I believe we
8 dismissed or I dismissed Miller, Nadeau, Newcomb and Novak.

9 MR. GORDON: Yes, Your Honor. And Pettersen is
10 the gentleman who is in the intractable infection situation
11 in a hospice care right now, and we just ask the Court's
12 indulgence to give us a little time to try to communicate
13 with him.

14 THE COURT: All right. And that motion to dismiss
15 is denied as well.

16 MR. HULSE: Your Honor, on Pettersen, we just ask
17 that a date be set for his compliance. We can revisit that
18 date if --

19 THE COURT: "Get up off that bed."

20 MR. GORDON: Exactly, Your Honor.

21 THE COURT: "And sign this document."

22 MR. GORDON: I would commit to this Court and to
23 Mr. Hulse to personally be involved with trying to
24 communicate with that gentleman and give him our earliest
25 possible response. I hate to say 30 days, if the doctors

1 tell us we can't talk to him for 30 days. I just don't
2 know.

3 MR. HULSE: We're obviously not going to move on
4 this case if those are the circumstances. And we didn't
5 know those were his circumstances until we saw the
6 opposition last night.

7 THE COURT: Okay.

8 MR. GORDON: Thank you, Your Honor.

9 THE COURT: Anything else from the Blackwell side
10 of the world?

11 MR. BLACKWELL: No, Your Honor. Although, I will
12 have to say to the Court it's difficult from our end too. I
13 mean the Court will feel their pain, but oftentimes we don't
14 even hear this until we come into court and we've wasted all
15 this time coming up to this. We spent a lot of time on
16 these orders, and as Your Honor knows, the parties need to
17 kind of do their best to comply with them. So we don't know
18 what to do when we have this sort of non-compliance, and we
19 wait to come in, and trust me, when Your Honor identifies
20 something called "CFYP," that's going to be a very broad
21 river that Your Honor said that before we're done.

22 THE COURT: On the positive side, imagine what
23 would happen if we didn't have these regular status
24 conferences.

25 MR. BLACKWELL: Oh, yes.

1 THE COURT: So there's that.

2 MR. GORDON: Your Honor, I will say that we are in
3 regular communication with Mr. Hulse by e-mail and phone on
4 these issues. And weekly if not daily trying to elucidate
5 the problems in this PFS process and difficult complicated
6 cases where people have died or people are in hospice care.
7 It's not as though we're ignoring it. We certainly do try
8 to meet the defendant halfway on this.

9 THE COURT: We in a moment will be in recess. And
10 I want to invite counsel back to chambers. And,
11 Mr. Blackwell, you can bring your guests, if you'd like. I
12 don't anticipate that there will be a lot of substantive
13 discussion. It's up to you.

14 Plaintiffs' counsel, bring whoever you would like
15 back. If you want to run out and meet some people on the
16 street, as long as they can get through the metal detector
17 downstairs. So we'll do that.

18 And hearing only from Mr. Hulse, we may be in
19 recess shortly but we're not yet.

20 MR. HULSE: Perhaps this is something that can be
21 discussed in chambers. We just, ad I'm sure this goes with
22 plaintiffs too, would like some additional guidance on the
23 scheduling of the Daubert and summary judgment hearing and
24 also Judge Leary's expectations about concurrent filings of
25 motions. So maybe that's something we can discuss back in

1 chambers.

2 THE COURT: All right.

3 JUDGE LEARY: Motions going forward?

4 MR. HULSE: Yes.

5 THE COURT: Okay. We're in recess.

6 (Court adjourned at 10:16 a.m.)

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13 I, Maria V. Weinbeck, certify that the foregoing is
14 a correct transcript from the record of proceedings in the
15 above-entitled matter.

16
17 Certified by: s/ Maria V. Weinbeck

18 Maria V. Weinbeck, RMR-FCRR
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